ORIGINAL

No. 99-9136

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

EARTHY D. DANIELS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant whose sentence was enhanced under a federal recidivist provision because of his prior state convictions, and whose state convictions have not been set aside by any court, may challenge his federal sentence under 28 U.S.C. 2255 based on the claim that the prior state convictions are constitutionally invalid.

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion under 28 U.S.C. 2255 (Pet. App. 1-4) is reported at 195 F.3d 501. The opinion of the court of appeals affirming petitioner's conviction is unreported, but the judgment is noted at 86 F.3d 1164 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1999. A petition for rehearing was denied on January 13, 2000 (Pet. App. 5). The petition for a writ of certiorari was filed on April 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g). He was sentenced, pursuant to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to 176 months' imprisonment. The court of appeals affirmed, United States v. Daniels, 86 F.3d 1164 (9th Cir. 1996) (Table), and this Court denied review. Daniels v. United States, 519 U.S. 1094 (1997). Petitioner then filed a motion under 28 U.S.C. 2255 to set aside his sentence, arguing that two of his prior state convictions that were used to enhance his federal sentence were invalid. The district court denied the motion. The court of appeals affirmed. Pet. App. 1-4.

1. Petitioner was stopped in a high crime area for suspicious behavior, and police found that he was carrying a gun. He pleaded guilty to a state charge of possession of a firearm by a convicted felon and was sentenced to 16 months' imprisonment. State authorities referred the case to the United States Attorney's Office because petitioner fit the criteria for a career offender under the ACCA.[1] A federal grand jury then charged petitioner with possession of a firearm by a convicted

[1] Federal prosecutors obtained a waiver of the Petite policy (see Petite v. United States, 361 U.S. 529 (1960)), under which the Department of Justice generally refrains from bringing a successive prosecution after a state prosecution for substantially the same acts or transactions. See Executive Office for U.S. Attorneys, U.S. Attorneys' Manual § 9-2.031 (June 1998).

felon, in violation of 18 U.S.C. 922(g). The government sought an enhanced sentence pursuant to the ACCA, which requires a fifteen-year mandatory minimum term of imprisonment for any person who violates 18 U.S.C. 922(g) and who has three previous convictions for a violent felony or serious drug offense or both.[2] United States v. Daniels, No. 95-50044, 1996 WL 292231 (9th Cir. June 3, 1996).

In April 1994, a jury found petitioner guilty of violating Section 922(g). At sentencing, the district court determined that petitioner was subject to sentencing under the ACCA because he had four qualifying predicate convictions from state courts in California: two for robbery and two for burglary. C.A. Excerpts of Record (E.R.) 12-18; Gov't C.A. Br. 2-3. Petitioner appealed, arguing that his two California burglary convictions were not qualifying ACCA predicates. The court of appeals rejected that argument, holding that petitioner's burglary convictions satisfied the test set forth in Taylor v. United States, 495 U.S. 575 (1990). Daniels, 1996 WL 292231 at *3-*4 (9th Cir. 1996). On January 21, 1997, this Court denied a petition for a writ of certiorari. Daniels v. United States, 519 U.S. 1094 (1997).

2. On January 16, 1998, petitioner filed a motion under 28

[2] 18 U.S.C. 924(e)(1) provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years.

U.S.C. 2255, in which he challenged his federal ACCA sentence. He claimed that the two California robbery convictions used to enhance his federal sentence were unconstitutionally obtained. E.R. 28-54. Petitioner's motion did not state whether he had previously challenged the validity of either of those convictions in state court or on federal habeas corpus. Ibid.

Petitioner alleged that the first robbery conviction, which dated from 1978, was unconstitutionally obtained because his guilty plea was not intelligent and voluntary. According to petitioner, the only basis for his liability was aiding and abetting the robbery, and he did not know at the time of his guilty plea that he could be convicted as an aider and abetter only if he intentionally assisted the commission of the crime. E.R. 33-38. Petitioner's counsel stated that the transcript of the proceeding at which petitioner pleaded guilty to the 1978 robbery is not available. E.R. 33 n.3.

Petitioner alleged that the second robbery conviction, which dated from 1981, was unconstitutionally obtained for two reasons. First, as with his 1978 conviction, petitioner claimed that his guilty plea was not intelligent and voluntary. Second, petitioner claimed that his counsel for the 1981 conviction rendered ineffective assistance by failing to move to suppress a statement made by petitioner following an arrest that violated the Fourth Amendment. E.R. 38-47. Petitioner did not tender the transcript of the proceeding at which petitioner pleaded guilty to the 1981 robbery, and it is not in the record in this case.

3. The district court denied petitioner's motion under Section 2255 in a written opinion, holding that petitioner was precluded from collaterally attacking his expired state convictions in Section 2255 proceedings. E.R. 100-107. The district court relied on this Court's decision in Custis v. United States, 511 U.S. 485 (1994), and on later Ninth Circuit decisions applying the rationale of Custis to Section 2255 motions. E.R. 103-107. Custis holds that a federal defendant may not bring a collateral attack at his ACCA sentencing to the validity of prior state convictions used to enhance the ACCA sentence, with the sole exception of a claim that his prior conviction was obtained in violation of his right to counsel under Gideon v. Wainwright, 372 U.S. 335 (1963). See Custis, 511 U.S. at 487. As the district court noted, in Clawson v. United States, 52 F.3d 806, 809 (9th Cir. 1995) (per curiam), and Contreras v. Schiltgen, 151 F.3d 906, 907 (9th Cir. 1998), the Ninth Circuit applied Custis to preclude attacks on prior state convictions made through the vehicle of a Section 2255 challenge to the federal ACCA sentence. E.R. 106-107.

4. The court of appeals affirmed, reiterating its holdings in Clawson and Contreras that "[i]n § 2255 proceedings, Custis bars federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a Gideon claim." Pet. App. 4. The court found that the rationale of Custis extends both to sentencing proceedings in general and to collateral challenges to recidivist sentences

based on alleged defects in the prior conviction. Id. at 3.

DISCUSSION

Petitioner contends that this Court should grant certiorari on the question whether a defendant may challenge a federal sentence that was enhanced on the basis of prior state convictions by filing a motion under Section 2255 that alleges that the prior state convictions were unconstitutionally obtained. That question has divided the courts of appeals, recurs with frequency, as the court below noted, see Pet. App. 3 ("hesitat[ing] to leave uncertainty hovering about an issue that is so quotidian"), and is important to the stability of federal sentences. This Court should therefore grant the petition.

1. In Custis v. United States, 511 U.S. 485 (1994), the defendant was convicted of possession of a firearm by a convicted felon under 18 U.S.C. 922(g)(1) and was subject to an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. 924(e)(1), because he had three or more prior convictions for a "violent felony or serious drug offense." The defendant sought to avoid the enhanced penalty in his federal sentencing proceeding by claiming that his prior state felony convictions were flawed by constitutional violations. This Court held that, with the single exception of a claim that a prior conviction was obtained in violation of the right to counsel, a defendant may not collaterally attack his prior convictions in a Section 924(e) sentencing proceeding. Custis, 511 U.S. at 487. The Court reasoned that the ACCA, which "focuses on the fact of the

conviction," provides neither a direct nor implied statutory right to challenge the underlying convictions. Id. at 491. The Court further held that the Constitution does not require an opportunity to collaterally challenge prior state convictions before they are used to enhance a federal sentence. Id. at 493-497.

In challenging his prior convictions, the defendant in Custis claimed a "denial of the effective assistance of counsel, that his guilty plea [to one prior felony] was not knowing and intelligent, and that he had not been adequately advised of his rights in opting for a 'stipulated facts' trial [on the other prior felony]." 511 U.S. at 496. The Court found that the defendant had no right to obtain review of those claims in resisting an ACCA sentence. Based on its precedent, the Court recognized a "unique," id. at 494, exception to the rule barring collateral attacks on prior sentences in federal sentencing proceedings that allowed claims that the prior conviction was obtained in violation of the right to counsel recognized in Gideon v. Wainwright, 372 U.S. 335 (1963). Custis, 511 U.S. at 493-497. Custis declined to extend those holdings beyond Gideon claims, however.

The Court in Custis also explained that its holding was supported by concerns for "[e]ase of administration" and the finality of judgments. 511 U.S. at 496-497. The Court noted that "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute

order," while other claims "would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." Id. at 496. Furthermore, "principles of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing." Id. at 497. As the Court has frequently observed, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice." Ibid. (internal quotation marks omitted). Those concerns, the Court noted, are heightened where the prior convictions "are based on guilty pleas." Ibid.

2. In the final paragraph of the opinion in Custis, the Court adverted to the question whether a defendant who was barred by Custis from challenging his prior state convictions in his federal sentencing proceeding would be able to attack those convictions by some other means. The Court stated:

> We recognize * * * that Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in Maryland or through federal habeas review. See Maleng v. Cook, 490 U.S. 488, 492 (1989). If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application.

511 U.S. at 497. Citing that language, the courts of appeals that have squarely addressed the issue have held that, if a federal defendant succeeds in having his prior state sentences

vacated, either by a state court or in federal habeas corpus review of those convictions under 28 U.S.C. 2254, he can then seek to reopen his enhanced federal sentence in a motion under Section 2255, arguing that the basis for enhancing his federal sentence is no longer valid. See, e.g., United States v. Walker, 198 F.3d 811, 813-814 (11th Cir. 1999); United States v. LaValle, 175 F.3d 1106, 1108 (9th Cir. 1999); United States v. Pettiford, 101 F.3d 199, 201-202 (1st Cir. 1996); United States v. Cox, 83 F.3d 336, 339 (10th Cir. 1996); United States v. Nichols, 30 F.3d 35, 36 (5th Cir. 1994).[3]

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[3] Petitioner characterizes (Pet. 5) the opinion of the court below as foreclosing a Section 2255 motion in those circumstances. If the Ninth Circuit had ruled that Section 2255 does not afford relief where a state conviction is valid at the time of sentencing but is later set aside by the jurisdiction that had entered it (or in federal habeas), and if that view were correct, it would follow logically that a defendant has no right to use Section 2255 proceedings as the vehicle for attacking the prior state convictions. The Ninth Circuit, however, had already decided in United States v. LaValle, 175 F.3d 1106, 1108 (9th Cir. 1999), that a Section 2255 motion may be used to challenge a federal sentence that was enhanced by a prior state conviction that was later vacated. Nothing in the decision below precluding collateral attacks on the prior convictions under Section 2255 purports to overrule the court of appeals' prior decision in LaValle allowing resentencing under Section 2255 when a prior conviction has already been set aside.

The court of appeals in United States v. Clark, 203 F.3d 358, 368 (5th Cir. 2000), read the Eighth Circuit's opinions in this area to foreclose a Section 2255 attack on a federal sentence when a prior state conviction had been used for enhancement but was later vacated. None of the Eighth Circuit cases, however, involved a defendant who had already obtained invalidation of his prior convictions before launching his collateral attack on the enhanced federal sentence. See, e.g., Partee v. Hopkins, 30 F.3d 1011, 1012 (8th Cir. 1994) (precluding 28 U.S.C. 2254 attack on state sentence on the ground that it had been enhanced by prior state conviction that was unconstitutionally obtained), cert. denied, 513 U.S. 1166 (1995); Charlton v. Morris, 53 F.3d 929 (8th Cir. 1995) (precluding

This case, however, is in a different procedural posture. Petitioner has not alleged that he has already obtained a judgment from some other court that the prior convictions used to enhance his federal sentence were invalid. From all that appears in the record, petitioner either failed to employ the procedures available to attack those convictions or failed to win relief. Instead, he seeks to employ Section 2255 itself to bring the attack on his prior convictions. Custis holds that he could not bring that challenge during the federal sentencing proceedings. The logic of Custis dictates that he may not bring his collateral challenge to his prior convictions under Section 2255 either.

If a petitioner who is barred by Custis from using his federal sentencing proceeding to attack prior state convictions could nevertheless use Section 2255 to accomplish that same objective, it would reduce Custis to a curiously futile gesture. A defendant could simply wait for his federal sentencing proceedings to be completed, and then -- a day, or perhaps an hour, later -- file a Section 2255 motion asserting precisely the same attack on his prior convictions that he was precluded from mounting in his federal sentencing proceedings. As a practical matter, there is no justification for insulating the sentencing

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Section 2254 attack on expired state sentence used to enhance prisoner's federal sentence and stating that similar result would follow if prisoner's attack were construed as having been brought under Section 2255); see also Arnold v. United States, 63 F.3d 708, 709 (8th Cir. 1995) (precluding Section 2255 attack on sentence under 21 U.S.C. 841 and 851 on the ground that it was enhanced by prior state conviction that was unconstitutionally obtained).

court under Custis from having to adjudicate the collateral attack on the prior state convictions, while requiring it to address the same attack as soon as the sentence has become final. And as a theoretical matter, it is impossible to justify a rule that would give a defendant broader grounds to collaterally attack his sentence under Section 2255 than he would have had within the sentencing proceeding itself. See, e.g., United States v. Frady, 456 U.S. 152, 166 (1982) ("We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.").

The facts of this case graphically demonstrate why the court of appeals' conclusion follows directly from Custis. The grounds for petitioner's challenges to his prior convictions -- that his guilty pleas were not intelligent and voluntary and that his counsel provided ineffective assistance -- are identical to two of the grounds on which the defendant in Custis attacked his prior convictions. See 511 U.S. at 496 ("Custis attacks his previous convictions claiming the denial of the effective assistance of counsel, that his guilty plea was not knowing and intelligent, and that he had not been adequately advised of his rights in opting for a 'stipulated facts' trial."). This Court in Custis held that "§ 924(e) does not permit [the defendant] to use the federal sentencing forum to gain review of his state convictions." 511 U.S. at 497. The court of appeals in this case correctly apprehended that Custis necessarily leads to the

conclusion that the defendant similarly may not use a Section 2255 attack on the federal sentence to gain review of his state convictions. Otherwise, a defendant in the position of petitioner could bypass the Custis holding by bringing his Section 2255 attack immediately after sentencing, thereby gaining precisely the review that he was denied in the sentencing proceeding itself.

3. The courts of appeals are divided on the question presented here. The majority rule, adopted by the court below in this case, as well as the Sixth, Seventh, and Eighth Circuits, is that a defendant who has not previously obtained a ruling invalidating his prior convictions may not do so in a Section 2255 attack on his federal enhanced sentence. Ryan v. United States, No. 98-1736, 2000 WL 715005 (7th Cir. June 5, 2000) (challenge to sentence enhanced by prior convictions under career offender provisions of Sentencing Guidelines § 4B1.1); Smith v. United States, 213 F.3d 291 (6th Cir. 2000) (challenge to sentence enhanced by prior convictions under ACCA); Turner v. United States, 183 F.3d 474 (6th Cir. 1999) (same), cert. denied, 120 S. Ct. 1255 (2000); Arnold v. United States, 63 F.3d 708, 709 (8th Cir. 1995) (challenge to sentence enhanced by prior convictions under 21 U.S.C. 841 and 851). As the Seventh Circuit concluded in Turner (183 F.3d at 477):

> Essentially [the defendant] seeks relief from his state convictions in his habeas petition attacking his federal conviction. Custis does not support this tactic. We read Custis as requiring [the defendant] to challenge the underlying state convictions first in the state court or in an independent habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254. Only after [the defendant] succeeds in such a challenge can he seek to reopen his sentence in this case.

By contrast, the Fifth Circuit has held that a defendant in the same circumstances as petitioner may challenge his underlying state convictions in an attack on his federal sentence under 28 U.S.C. 2255. In United States v. Clark, 203 F.3d 358 (5th Cir. 2000), the defendant, like petitioner, was convicted of being a felon in possession of a firearm under 18 U.S.C. 922(g)(1), and he was subjected to the enhanced penalties authorized by the Armed Career Criminal Act based on his prior state convictions. Like petitioner, the defendant in Clark never obtained any ruling from any court -- either before or after his federal sentencing -- that his prior state convictions were invalid. Nonetheless, the defendant in Clark, like petitioner, sought to attack the constitutionality of his state convictions, on which he was no longer "in custody" within the meaning of 28 U.S.C. 2254, by way of a motion seeking to set aside his federal sentence under 28 U.S.C. 2255. The district court in Clark dismissed the defendant's Section 2255 motion, concluding that Custis precluded him from attacking his prior state convictions by means of an attack on his federal sentence. 996 F. Supp. 691.

The court of appeals reversed and remanded, holding that a defendant may obtain relief through a Section 2255 motion that would have been precluded under the rule in this case and in the Sixth, Seventh, and Eighth Circuits. Specifically, the court in Clark held that it "disagree[d] with the district court's

conclusion that Custis has rendered unavailable a section 2255 challenge to constitutionally infirm prior state convictions that have been used to enhance a federal sentence being currently served." 203 F.3d at 362-363. In the court's view, "[i]f [the defendant] has exhausted his state remedies and if he is not 'in custody' for purposes of a section 2254 challenge to his [prior state] convictions, then the district court should address [the defendant's] section 2255 petition." Id. at 370. The court added that relief should be withheld if defendant "would for any reason * * * not have been entitled to relief as to [the state convictions] in a section 2254 proceeding against an appropriate state respondent." Ibid. But a defendant who would have been entitled to relief in a Section 2254 proceeding attacking the prior state convictions (but for the fact that he is not "in custody" on those convictions) may obtain relief in a Section 2255 proceeding challenging the federal sentence that was enhanced on the basis of those convictions. The Fifth Circuit remanded the Clark case to the district court for a determination whether the defendant there could in fact make the showings that would entitle him to relief.[4]

4. The conflict between the majority view -- as embodied in the decision below and decisions of the Sixth, Seventh, and

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[4] In Clark, the Fifth Circuit expressly disagreed with the Eighth Circuit's holding in Arnold that claims of this sort could not be brought. See 203 F.3d at 368. In a more recent decision addressing a related matter, the Fifth Circuit expressly noted the conflict between its decision in Clark and the Sixth Circuit's decisions in Turner and Smith. See Pack v. Yusuff, No. 99-60283, 2000 WL 942919, at *4 (5th Cir. July 10, 2000).

Eighth Circuits -- and the Fifth Circuit's view in Clark is substantial and warrants this Court's review. As demonstrated by the increasing number of appellate opinions that have recently addressed the issue, defendants who are permitted to obtain relief from an enhanced federal sentence by attacking their prior state convictions will often seek to do so. There is no reason why defendants in the Fifth Circuit should be permitted to obtain relief from sentences under Section 924(e) and other similar federal provisions on grounds that would not lead to relief in the Sixth, Seventh, Eighth, or Ninth Circuits. Moreover, district courts and federal prosecutors in the Fifth Circuit after Clark -- unlike those in the Sixth, Seventh, Eighth, and Ninth Circuits -- will have "to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States," Custis, 511 U.S. at 496, to respond to challenges to state court convictions, such as the 1983 convictions at issue in Clark itself, see 203 F.3d at 360-361. Those substantial additional burdens should not be imposed on federal courts and prosecutors absent review by this Court.

The question presented in this case is distinct from the issues decided in Apprendi v. New Jersey, No. 99-478 (June 26, 2000), and in Almendarez-Torres v. United States, 523 U.S. 224 (1998). Those cases address whether a jury must find beyond a reasonable doubt factors that enhance statutory maximum sentences. This case concerns whether a defendant may raise a constitutional challenge to the validity of prior convictions used to enhance a federal sentence. Such a legal challenge would be decided by a court, not a jury, whether or not the prior conviction enhances a defendant's statutory maximum sentence, and whether or not a jury was required to find that the fact of prior

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2000

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conviction was established beyond a reasonable doubt. Accordingly, the question presented in this case is not affected by the Court's rulings in Apprendi and Almendarez-Torres.

IN THE SUPREME COURT OF THE UNITED STATES

DANIELS, EARTHY D.
Petitioner

vs. No. 99-9136

USA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** via fax and first class mail, postage prepaid, on this 19th day of July 2000.

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